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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MAT J. ROGERS, **Plaintiff and Respondent,** **v.** **HERMAN FRANCK et al.,** **Defendants and Appellants.**	**A100655** **(San Francisco County Super. Ct. No. 309623)**

Herman Franck (Franck) and Stephen Gargaro (Gargaro) appeal from a judgment entered against them for the malicious prosecution of their client's lawsuit against respondent Mat J. Rogers (Rogers). They contend: (1) the elements of malicious prosecution, including a favorable termination on the merits in the underlying action and lack of probable cause in bringing the underlying action, were not established; (2) Rogers was actually guilty of the charges asserted in the underlying action; (3) a trial subpoena was improperly quashed; (4) the court erred in ruling on motions in limine and excluding other evidence; and (5) the court erred in refusing appellants' proposed jury instructions. Appellants also contend the trial court erred in denying their motion for a new trial, which asserted, inter alia, that the compensatory and punitive damage awards were excessive. They further contend that Gargaro, as a mere law firm employee, should not be held liable.

We conclude the punitive damage award imposed against Franck was excessive as a matter of law. We therefore vacate that portion of the judgment and remand for further proceedings consistent with this opinion. Appellants' other arguments have no merit, and the judgment is otherwise affirmed.

I. FACTS AND PROCEDURAL HISTORY

A. PRELUDE, PART ONE: THE CLAY STREET PROJECT AND TERMINATION AGREEMENT

Rogers was a carpenter and contractor who worked with developer Rene Peinado (Peinado) on construction projects. One of the projects pertained to property on Clay Street in San Francisco (Clay Street Project), which was beneficially owned by Seven Hills Development L.L.C. (Seven Hills). Seven Hills was owned and controlled by Peinado.

After disputes arose, Seven Hills and Rogers entered into a termination agreement, dated August 30, 1996, by which they agreed he would cease work as of August 5, 1996, and the parties would release each other (and their respective agents, representatives, and others) from any causes of action, known or unknown, suspected or unsuspected, "in any way arising from their association with one another in connection with Clay Street." Further, the parties waived their rights under Civil Code section 1542, which otherwise precludes a general release from extending to unknown or unsuspected claims. The parties "acknowledge[d] and assume[d] the risk" that they might later discover facts "different from, or in addition to, those which they now know or believe to be true with respect to the release of claims," and the release would be enforceable and effective nonetheless.

B. PRELUDE, PART TWO: THE LYONS ARBITRATION

About four months later, Rogers instituted an arbitration action against Peinado, seeking to recover amounts owed for work Rogers performed for Peinado on a project on Lyons Street in San Francisco (the Lyons Arbitration). Peinado was represented by appellants, attorneys Franck and Gargaro.

After Peinado failed to appear at the arbitration hearing, he signed under penalty of perjury a declaration dated October 8, 1997, claiming he had been at sea attending a mandatory training program for bar pilots. Rogers later rebutted this claim with the testimony of Captain Patrick A. Moloney, Executive Director of the Board of Pilot Commissioners, who asserted that Peinado was not a bar pilot and the trip verification Peinado had submitted was a forgery.

A second declaration by Peinado, also dated October 8, 1997, set forth Peinado's defense to the arbitration claims (Peinado Declaration). In addition to repeating his purported excuse for failing to appear at the hearing, Peinado insinuated that Rogers had initiated the arbitration in retaliation for Peinado firing him from the Clay Street Project after Peinado suspected Rogers of stealing $3,000 of marble and doing shoddy work. This representation would subsequently assume great significance in the litigation now before us.

In December 1997, Rogers obtained an arbitration award against Peinado for approximately $11,000. The municipal court confirmed the arbitration award, and the superior court's appellate department affirmed the municipal court's decision.[1]

C. THE UNDERLYING ACTION: SEVEN HILLS V. ROGERS

On December 18, 1997—just two weeks after the arbitration award in the Lyons Arbitration—Rogers was sued by Seven Hills in *Seven Hills Development LLC v. Rogers* (Super. Ct. San Francisco County, 1998, No. 991828). Seven Hills was represented by appellants. The first cause of action accused Rogers of converting $3,000 of Seven Hills' marble from the Clay Street Project. The second cause of action sought rescission of the

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[1] Peinado had asserted counterclaims against Rogers in the arbitration, which were rejected. After confirmation of the arbitration award in Rogers' favor, Rogers sued Peinado and appellants for malicious prosecution of the counterclaims. The trial court sustained their demurrer without leave to amend. In *Rogers v. Peinado* (2000) 85 Cal.App.4th 1, we affirmed the judgment in part, concluding the parties' agreement to resolve their disputes by arbitration precluded the judicial remedy for malicious prosecution. We reversed the judgment as to Franck and Gargaro. Rogers later dismissed the case.

termination agreement, by which the parties had purported to resolve the Clay Street Project, on the ground that Peinado was unaware when he entered into the termination agreement that Rogers had stolen the marble. Seven Hills claimed the termination agreement (and the release therein) were therefore induced by Rogers' fraud. (See Civ. Code, § 1689, subd. (b).)

Rogers filed a demurrer to Seven Hills' complaint, contending the action was precluded as a matter of law by the termination agreement. The demurrer argued that, despite Seven Hills' attempt to plead around the Clay Street Project termination agreement by contending it was fraudulently induced, the Peinado Declaration in the Lyons Arbitration asserted that Peinado *had* suspected Rogers stole the marble when he fired Rogers from the Clay Street Project. Taking judicial notice of the Peinado Declaration, the court sustained the demurrer with leave to amend.

Seven Hills, by appellants, filed a second amended complaint in April 1998, which Peinado verified. The second amended complaint alleged that Franck had made a mistake in drafting the Peinado Declaration, and that plaintiff had not known the marble was missing until about three weeks after the termination agreement was signed.[2] The second amended complaint was signed by appellant Gargaro, in appellant Franck's name.

Attached to the second amended complaint, ostensibly to establish that the marble issue was being negotiated *after* the termination agreement, were the following: (1) the

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[2] The relevant allegations asserted: "Plaintiff did not learn any information about the fact that the marble was even missing until about 3 weeks after the signing of the August 30, 1996 termination agreement. Plaintiff first learned of the missing marble when it was brought out from bulk storage to the installation area of the subject residence, and two workers advised him then and there that Rogers had stolen it. Plaintiff did not have any sort of suspicions or other information at all concerning the marble as of August 30, 1996 [the date of the termination agreement]. To the extent anything to the contrary is set forth in declarations submitted before AAA, those statements are the result of plaintiff's counsel's [Herman Franck] mistakes in accurately describing the factual details. The fact remains that plaintiff did not know anything at all about the stolen marble, and had zero suspicions about it, until 3 weeks after the signing of the termination agreement."

termination agreement; (2) an undated letter from Joseph Breall, Esq., a partner of Seven Hills, to Kenneth Katzoff, counsel for Rogers; and (3) a letter dated October 21, 1996 from Breall to Katzoff. In the undated writing, Breall demanded compensation for marble Rogers took from the Clay Street Project. He disputed Katzoff's contention that the marble issue was within the scope of the release in the termination agreement, arguing that Rogers's failure to disclose his taking of the marble before entering into the agreement constituted fraud. Breall proposed a settlement by which Rogers would pay "850.00 and provide a full and complete mutual release to Seven Hills, myself and Mr. Peinado for all matters involving, Seven Hills, Lyon Street, Clay Street and the relationship between the parties." (It is unclear why Breall would request a release involving "Clay Street" since the termination agreement had already been signed.) In the October 21 letter, Breall followed up: "I am surprised and more than a little disappointed that I have not received the letter or settlement agreement regarding the marble issue. You had promised me this document by facsimile. In addition, your letter was to assure me that the eight hundred and fifty dollars we agreed upon as settlement would be deposited in your trust account pending our executing your written documentation. [¶] If I do not hear from you by 5:00 p.m. tomorrow, I will have no choice but to immediately initiate legal action against Mr. Rogers."

Rogers's demurrer to the second amended complaint was overruled.

Rogers filed a motion for summary judgment, arguing that the Peinado Declaration precluded Seven Hills from establishing it was *not* aware of the purported theft when it signed the termination agreement, and therefore Seven Hills could not obtain rescission of the termination agreement, and the termination agreement thus barred the underlying action as a matter of law. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1 (*D'Amico*).)

In opposition to the motion, Seven Hills argued that the relevant portion of the Peinado Declaration was a mistake, and the true facts were set forth in the verified second amended complaint, thus giving rise to at least a triable issue of fact with respect to the

rescission claim. The only evidence to which Seven Hills referred in its memorandum of points and authorities was the verified second amended complaint.

The Honorable Ronald E. Quidachay granted Rogers's summary judgment motion by written order filed January 22, 1999. The court ruled: "Defendant ROGERS' Motion for Summary Judgment is hereby granted as a matter of law because Plaintiff's action is barred by the Civil Code Section 1542 release contained in the Termination Agreement dated August 30, 1996, between the parties . . . . Specifically, the Court finds that there was no fraud on the part of Defendant ROGERS to induce Plaintiff to enter into the Termination Agreement containing the Civil Code section 1542 release."

Rogers filed a motion for attorney fees, as provided in the termination agreement, seeking approximately $27,000. Contending that Seven Hills was a defunct shell entity, Rogers also filed a motion to amend the judgment to name Peinado as real-party-in-interest plaintiff to be held responsible for the costs of suit, based on alter ego liability. The motions were vigorously resisted by Peinado, who initiated discovery over Rogers's objections.[3] The court granted both motions, awarding attorney fees and costs, which by that point had grown to $103,558.17, against Peinado. The court found that the fees and costs were reasonable, noting among other things that Peinado had been recalcitrant in his discovery obligations and had caused delays.

Both Peinado, represented by another attorney, and Seven Hills, represented by appellants, filed a notice of appeal from the December 17, 1999, order. By the time the appeal was settled, Rogers had incurred approximately $200,000 in legal expenses in the trial court and Court of Appeal.

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[3] Peinado failed to appear for his deposition, requiring Rogers to bring a motion to compel. The court granted the motion and imposed sanctions. Peinado and appellants were sanctioned three additional times in the amounts of $1,200, $3,173, and $1,575. (In this regard we note that Rogers requested this court to take judicial notice of a trial court order filed July 9, 1999. We deferred ruling on the request until our consideration of the merits of the case. We now grant Rogers's request.)

D. THE MALICIOUS PROSECUTION ACTION

While the appeal of the underlying action was still pending in February 2000, Rogers filed this action for malicious prosecution against Peinado and appellants, alleging they had maliciously filed and maintained the underlying action. Peinado settled out of the malicious prosecution action (along with the underlying action and appeal, mentioned above) for $150,000, pursuant to a good faith settlement. The case proceeded against appellants Franck and Gargaro.

1. Denial of Appellants' Summary Judgment Motion

Appellants filed a motion for summary judgment, contending Rogers could not establish the elements of malicious prosecution: a favorable termination of the underlying action on the merits; appellants' lack of probable cause in filing the underlying action; and malicious intent. As to probable cause, appellants pointed to Breall's attempts to obtain a settlement of the marble issue *after* entry of the termination agreement, as well as a telephone conversation between Franck and Rogers's attorney after the underlying action was filed.[4] Also within the context of their assertion of probable cause, appellants contended that Rogers was in fact guilty of taking the marble and concealing his alleged conversion.

The trial court denied appellants' motion by written order dated May 17, 2002, finding a triable issue of fact with respect to all three elements of malicious prosecution.

2. Quash of Trial Subpoena on Judge Quidachay

Appellants subpoenaed Judge Quidachay to explain at the malicious prosecution trial why he had granted summary judgment in the underlying action. The trial court granted Judge Quidachay's ex parte application to quash the subpoena. (See Evid. Code, § 703.5.)

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[4] In this conversation, Rogers's attorney (Katzoff) purportedly told Franck the marble issue had been settled, to which Franck responded "Then pay it and the case will go away." Apparently, Franck believed Katzoff was indicating the marble issue had been resolved by the *proposed* settlement of $850, so that if the sum were paid the case would

3. Trial of Malicious Prosecution Action

The trial court ruled on in limine motions and admitted evidence, which, to the extent relevant to this appeal, is described *post*. The jury found Frank and Gargaro liable for malicious prosecution, awarding $500,000 in compensatory damages against each of them jointly and severally.[5] In the trial's second phase, the jury imposed $400,000 in punitive damages against Franck and $200,000 in punitive damages against Gargaro. Appellants were credited for Peinado's settlement with Rogers.

Appellants filed a motion for a new trial, which was denied except for a reduction in the amount of punitive damages against Gargaro to $25,000, which Rogers accepted.

4. Appeal

Appellants filed a notice of appeal on October 29, 2002, which was amended on October 31, 2002. They elected to proceed by way of an appellant's appendix, in lieu of the preparation of a clerk's transcript, pursuant to rule 5.1 of the California Rules of Court.[6] On May 14, 2003, we denied their motion to augment the record to add certain records (the transcript of the August 5, 2002, hearing on in limine motions and the trial testimony of Rogers and Captain Moloney on August 6 and 7, 2002; appellants' motion in limine papers; the trial subpoena they issued to Judge Quidachay; the motion to quash the subpoena, and the order quashing it).

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be dismissed. But Katzoff's statement could also reflect his understanding that the marble issue was settled by the termination agreement.

[5] In their special verdict, the jury also concluded: (1) appellants initiated or were actively instrumental in the commencement or maintenance of the underlying action; (2) appellants acted without probable cause; (3) appellants acted with malice; and (4) appellants' actions caused injury, damage, loss, or harm. In addition, the jury found, by clear and convincing evidence, that appellants acted with malice.

[6] The appendix they filed, however, does not conform to the California Rules of Court, rule 5.1 requirements of a chronological arrangement of documents, consecutively numbered pages, and both alphabetical and chronological indexes listing each document and the volume and page on which it appears. (Cal. Rules of Court, rules 5.1(c), 9(a)(C) & (D), 9(b).) We may impose monetary or other sanctions for filing an appendix that violates California Rules of Court, rule 5.1. (Cal. Rules of Court, rule 5.1(f); see

Because appellants had designated less than all the testimony to be prepared by the reporter, their designation notice was supposed to identify the points they would raise on appeal, with the appeal being limited to those points. (Cal. Rules of Court, rule 4(a)(5).) The notice identified no issues. However, we permitted appellants to file a late statement of issues, which identified the issues later raised in their opening brief (although some of the issues in their brief can be considered only in the context of their challenge to the denial of their new trial motion). California Rules of Court, rule 4(a)(5), therefore, does not preclude our consideration of the issues raised in their brief.

After filing their statement of issues, appellants did not renew their request to augment the record. Although Rogers makes much of this in his respondent's brief, he included the very material in his respondent's appendix. Rogers therefore can no longer object that the record is insufficient for our review.

II. DISCUSSION

To establish a cause of action for malicious prosecution, the plaintiff must demonstrate that the prior action was (1) commenced by or at the direction of the defendant and pursued to a legal termination in the plaintiff's favor; (2) brought without probable cause; and (3) initiated with malice. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871 (*Sheldon Appel*).) Appellants challenge the court's findings with respect to the elements of favorable termination on the merits and probable cause. In addition, they challenge both the judgment and the denial of their new trial motion on numerous grounds. We address their contentions in turn.

A. FAVORABLE TERMINATION ON THE MERITS

We begin with whether the underlying action was terminated on the merits.

In granting Rogers summary judgment in the underlying action, the court found that Rogers had not fraudulently induced Peinado to enter into the termination agreement

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generally *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29; *In re Marriage of Green* (1984) 159 Cal.App.3d 1163, 1164-1165.) We elect not to in this instance.

and, therefore, the termination agreement barred Peinado's claim for conversion of the marble and rescission of the termination agreement.

In the malicious prosecution action now before us, the trial court was twice called upon to determine whether the summary judgment in the underlying action was a termination on the merits. First, in response to appellants' summary judgment motion, the court concluded there was at least a triable issue as to whether the underlying action was terminated on the merits. Second, after hearing the evidence at trial, the court found that the underlying action was, indeed, terminated in Rogers's favor on the merits. Appellants contend the court was wrong in both instances.

To determine whether there was a favorable termination on the merits, we look at the judgment as a whole in the prior action. (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 129.) It is not essential that the prior litigation was favorably terminated after a trial. (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750 (*Lackner*).) Rather, the question is whether the termination "reflect[s] the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit." (*Pender v. Radin* (1994) 23 Cal.App.4th 1807, 1814.) Thus, a favorable termination on the merits may be based on the grant of summary judgment. (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1191 [summary judgment granted on meritless claim]; *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1149-1150 (*Sierra Club*) [insufficient evidence to establish triable issue of fact]; *Ray v. First Federal Bank* (1998) 61 Cal.App.4th 315, 318 [defendant as a matter of law violated no duty to plaintiff].)

However, a "technical or procedural [termination] as distinguished from a substantive termination" is not "favorable" for purposes of a malicious prosecution claim. (*Lackner*, *supra*, 25 Cal.3d at pp. 751-752 [statute of limitations, statute of frauds]; *Dalany v. American Pacific Holding Corp*. (1996) 42 Cal.App.4th 822, 828-829 [settlement] (*Dalany*)[7]; *Asia Investment Co. v. Borowski* (1982) 133 Cal.App.3d 832,

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[7] In *Dalany*, the resolution of the underlying action was by a negotiated settlement. (*Dalany, supra,* 42 Cal.App.4th at pp. 828-829.) That is, of course, a different situation

838-839 [laches].) Whether there was a favorable termination on the merits is a legal question for the court. (*Sierra Club, supra,* 72 Cal.App.4th at p. 1149.)

Our first step is to examine the language used by the court in the underlying action in granting summary judgment, to determine if it reflects Roger's innocence of the allegations of the complaint: that he stole or converted the marble and that he fraudulently induced the termination agreement by concealing the theft. In the underlying action, the court found: "there was no fraud on the part of Defendant ROGERS to induce Plaintiff to enter into the Termination Agreement." Thus, the trial court concluded that Rogers was innocent of the wrongdoing alleged in the rescission cause of action: this was certainly a ruling on the merits. Although the trial court omitted any finding that Rogers had not converted the marble, it ruled the conversion claim was barred by virtue of the release in the termination agreement. This ruling terminated the rescission claim—and the action as a whole—on the merits.

Termination of the underlying action based on the release in the termination agreement was a substantive adjudication on the merits, because it enforced the substantive rights and obligations of the parties under the terms of a contract (the termination agreement). In this manner, plaintiff's claims were not precluded by operation of law or a procedural rule, but by the agreement of the parties that no liability would exist for the conduct alleged. Based on this substantive foundation, Rogers must be deemed innocent of the causes of action asserted against him in the underlying action. This conclusion is consistent with the public policy favoring the enforcement of settlement agreements and the preclusion of litigation they were intended to avoid. (See also *Berman v. RCA Auto Corp*. (1986) 177 Cal.App.3d 321 [underlying action for misrepresentation was terminated on the merits where the statements were privileged under Civ. Code, § 47].)

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than the one before us, in which the underlying action was terminated by summary judgment, based on the preclusive effect of a *prior* settlement agreement and release.

Indeed, appellants *do not argue* that the underlying action was terminated on a procedural ground merely because it was found subject to the termination agreement. Instead, they argue there was no termination on the merits because, in order to *reach* the substantive conclusion that the underlying action was barred by the termination agreement, the trial court applied *D'Amico, supra,* 11 Cal.3d 1, to disregard Peinado's allegations in the verified second amended complaint that he was unaware of the marble theft.

In this regard, appellants rely on *Hall v. Harker* (1999) 69 Cal.App.4th 836 (*Hall*). In *Hall*, the court concluded that the summary judgment in an underlying action was not a favorable termination on the merits, because it was based on the parol evidence rule (and statute of frauds). The court stated: "even if the parol evidence rule renders evidence of collateral agreements legally irrelevant, it cannot erase the existence of the agreements, if they actually took place. And if they took place as alleged, their irrelevancy precludes a legal determination of the defendant's culpability." (*Id*. at p. 845, italics omitted.) Based on *Hall*, appellants contend that even if *D'Amico* renders Peinado's evidence legally irrelevant, it does not erase the existence of the evidence, and a malicious prosecution claim should not be available.

For the following reasons, appellants' argument is unavailing.

1. Termination Not Procedural

In the first place, there is a significant distinction between cases terminated on a procedural or technical ground (e.g., statute of frauds, statute of limitations) and cases such as the one before us, which are terminated for a substantive reason (enforcement of the settlement agreement and release) because there was *no evidence* contrary to its enforcement. Here, the court concluded there was no admissible evidence of fraud or any other basis for rescission of the termination agreement. This absence of admissible evidence cannot be considered "procedural"—to the contrary, it reflects the inability of a party to prove a substantive claim. And the mere fact that the conclusion of "no evidence" was reached after application of evidentiary principles does not make it

"procedural," any more than a jury verdict would be "procedural" if rendered after a trial in which the court excluded inadmissible evidence.[8]

In other words, where there is no admissible evidence supporting an element of a cause of action, the resulting termination of the litigation is substantive and on the merits, even if there was some inadmissible evidence proffered to prove the element. Otherwise, an absurdity would result: a plaintiff who knowingly and maliciously asserted an invalid claim, could simply proffer some inadmissible evidence to which the court sustains an objection, and thereby immunize himself from liability for malicious prosecution.

We believe *Hall* was incorrectly decided for this reason. In any event, the termination of the underlying agreement in the matter before us was on the merits.

2. *Casa Herrera*

After the parties' briefing in this matter, our Supreme Court disapproved of *Hall*, the primary case on which appellants rely, in *Casa Herrera, Inc. v. Beydoun* (Feb. 2, 2004, S111998) __Cal.4th__ [04 D.A.R. 1207] (*Casa Herrera*).

In *Casa Herrera, supra,* __Cal.4th__ [04 D.A.R. 1207] the Court of Appeal had found a termination on the merits because no substantial evidence supported the underlying claims for breach of contract and fraud. Respondents nevertheless contended that the termination was procedural or technical, because in *reaching* its conclusion, the Court of Appeal refused to consider evidence of prior negotiations in light of the parol evidence rule. The Supreme Court recognized, as we would, that the absence of evidence appeared to be a determination *on the merits*. (*Id*. at p. 1208.)

The Supreme Court nonetheless proceeded to consider respondents' claim and evaluated the nature of the parol evidence rule. Unlike traditional rules of evidence, the court noted, the parol evidence rule does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on probative value or policy. (*Id*. at pp. 1208-1209.)

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8 Of course, the existence of *in*admissible evidence supporting the underlying action could still be considered in evaluating the independent element of probable cause, since counsel could have had a good faith belief in the admissibility of the evidence and, accordingly, the viability of the underlying action.

Instead, the evidentiary consequences of the rule follow from its substantive component–which establishes, as a matter of law, the enforceable and incontrovertible terms of an integrated written agreement. (*Id*. at p. 1209.) Accordingly, the parol evidence rule is a substantive rule. (*Id*. at pp. 1208-1210.) The court then disapproved of *Hall*, because it had misconstrued the nature of the parol evidence rule.

As in *Casa Herrera*, appellants in this case contend the exclusion of evidence was due to a procedural or technical mechanism—in this case, the rule in *D'Amico*. For the reasons we discuss *ante*, we do not believe it necessary to evaluate whether a rule applied by the court was procedural, if it merely *led* to the court's substantive conclusion that a plaintiff had no evidence to support his case. We need not reach this issue, however, because appellants fail to demonstrate, as a threshold matter, that the termination of the underlying action *was* the result of the application of *D'Amico*.

As Rogers (and the trial court in this action) have pointed out, the order granting summary judgment in the underlying action did not specify that the court, in reaching its conclusion, excluded any evidence from its consideration. Rogers argues that the court therefore did *not* exclude the second amended complaint, on the grounds of *D'Amico* or otherwise, and therefore we do not have to consider the nature of the *D'Amico* rule. Appellants counter that Rogers sought summary judgment on the basis of *D'Amico*, and at the hearing the trial court queried appellants why *D'Amico* would not apply. Further, appellants insist, the trial court could not have found there was no triable issue of material fact—which it must do to grant summary judgment—*unless* it disregarded the second amended complaint. Peinado's assertion in the second amended complaint (that he did not know about the marble theft when the termination agreement was signed) was diametrically opposed to what he said in the Peinado Declaration (that he did know by the time Rogers was fired), thus creating a triable issue as to his knowledge or, at least, as to the credibility of his conflicting assertions.

From our reading of the record, however, the verified second amended complaint *could* have been disregarded in the trial court for a reason other than *D'Amico*. In opposition to the summary judgment motion, Peinado submitted no evidence other than

the verified second amended complaint. Summary judgment is supported or opposed on the basis of affidavits or, more typically, declarations. (Code Civ. Proc., § 437c.) While a verified complaint might be considered a "declaration" within the meaning of the summary judgment statutes, the document would have to meet strict statutory standards. By statute, a declaration supporting or opposing a summary judgment motion "shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (Code Civ. Proc., § 437c, subd. (d).) A "declaration" must "recite[] that it is certified or declared by him or her to be true under penalty of perjury" and must state "that it is so certified or declared under the laws of the State of California." (Code Civ. Proc., § 2015.5.) Peinado's attempt to verify the second amended complaint did *not* recite that it was made under penalty of perjury under California law; it therefore did not constitute a declaration under Code of Civil Procedure section 2015.5, and was insufficient to fend off a summary judgment motion under Code of Civil Procedure section 437c.[9]

Because appellants have not affirmatively established that the underlying action was terminated by application of the *D'Amico* rule, we do not consider whether the *D'Amico* rule is procedural or substantive.[10]

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9 A party may waive his right to have a purported declaration stricken on this ground if he does not object by the time of the summary judgment hearing. (Code Civ. Proc., § 437c, subd. (d).) However, Rogers's failure to point out the matter at the hearing did not preclude the court from enforcing sua sponte the procedural requirements for summary judgment motions.

10 Appellants argue that it is obvious the trial court in the malicious prosecution action excluded the relevant portions of the second amended complaint from evidence because it overruled the demurrer. If the allegations of the verified second amended complaint were sufficient to withstand a demurrer, they argue, those allegations must have been sufficient to withstand summary judgment. Of course, the comparison is inapt. On demurrer, all well-pleaded factual allegations are deemed to be true. On motion for summary judgment, the factual allegations must be supported by admissible evidence. (See *D'Amico*, *supra*, 11 Cal.3d at p. 20 ["'The question [on summary judgment] therefore is not whether defendant states a good defense in his answer but whether he can

In the final analysis, the summary judgment in the underlying action was a termination on the merits for purposes of a malicious prosecution action.

B. DETERMINATION OF WHETHER APPELLANTS LACKED PROBABLE CAUSE

Probable cause is an honest suspicion or belief on the part of the party instituting the action, based on "'facts sufficiently strong to warrant the average person in believing the charge to be true.'" (*Williams v. Coombs* (1986) 179 Cal.App.3d 626, 634.) While the issue is ultimately a legal one for the court, a factual dispute as to the party's knowledge or belief is for the trier of fact. (*Sheldon Appel, supra,* 47 Cal.3d 863 [error to permit jury to decide whether law firm had prosecuted claims that a reasonable lawyer would regard as tenable, where there was no disputed question as to the facts known to the law firm].)

In the malicious prosecution case, the trial court denied appellants' summary judgment motion on the ground there was a triable issue as to appellants' probable cause to pursue the underlying action. At the conclusion of the trial, having been instructed on the requisites for finding a lack of probable cause, the jury determined that appellants did, indeed, lack probable cause.[11] Based on the evidence and arguments of counsel, the trial

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show that the answer is not an attempt "to use formal pleading as means to delay the recovery of just demands." [Citation.]'"].)

[11] In this regard, the jury was instructed, in part: "To constitute lack of probable cause for the initiation or maintenance of a civil proceeding against the plaintiff in this case, the evidence must establish that: [¶] 1. At the time of the filing of, or during the filing of the prior civil proceeding, defendants knew that their client Rene Peinado had a prior suspicion or knowledge of the alleged removal of marble by plaintiff at the time the Termination Agreement with a waiver of Civil Code Section 1542 provisions was entered into by the parties to said agreement. [¶] 2. At the time of the filing of, or during the filing of the prior civil proceeding, defendants did not have a subjectively reasonable and honest belief that the previous civil proceeding was tenable." This latter requirement, pertaining to appellants' subjective belief, is germane to the issue of malice, not probable cause. (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 875.) This instructional error does not compel reversal, however, because the instruction required the jury to find both subjective unreasonableness *and* appellants' knowledge of Peinado's suspicion regarding the alleged marble theft, the latter finding being sufficient in itself to support the conclusion that appellants lacked probable cause. Moreover, although it was not the

court subsequently made an independent determination that appellants lacked probable cause in pursuing the underlying action.

Sufficient evidence supported these determinations. The evidence before the trial court on summary judgment and before the jury at trial included the following: Rogers and Peinado had entered into a termination agreement, which included a full release of claims arising out of the Clay Street Project; the claim for marble theft arose out of the Clay Street Project; and Peinado had declared under penalty of perjury that he suspected Rogers stole the marble before he terminated him (by way of the termination agreement). Although Peinado had subsequently verified allegations that he had *not* known about the marble theft, appellants knew that Peinado was willing to perjure himself because he had apparently done so previously in claiming that he missed the arbitration hearing for bar pilot training. Although there was correspondence after execution of the termination agreement in which Breall (of Seven Hills) insisted the termination agreement had not settled the marble issue, the correspondence also indicated that Rogers disagreed with that conclusion. Thus, while the evidence was not overwhelming, a reasonable trier of fact could infer that appellants knew Peinado had known or suspected the alleged removal of the marble by Rogers by the time of the termination agreement. Further, the termination agreement on its face barred all claims arising from the Clay Street Project, whether "known or unknown," "suspected or unsuspected." From this, the trial court could properly conclude that, as a legal matter, a reasonable attorney would consider the underlying action to be untenable.

Appellants argue that a complaint which survives a demurrer, such as Seven Hills' second amended complaint, is automatically deemed to have been initiated with probable cause. Not so. Their reliance on *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 626, is misplaced. There, the court ruled that lawyers had probable cause to bring a claim where the demurrer was overruled *and* "the allegations in the complaint were true

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jury's role to make the determination of probable cause, the trial court made its independent finding on this point.

to the best of the lawyers' knowledge at the time the complaint was filed." Here, the jury could have reasonably inferred that the allegations of the second amended complaint were *not* true to the best of appellants' knowledge when they filed it.

Appellants also argue there was probable cause to file and maintain the underlying action, because Rogers testified *at the malicious prosecution trial* that he took the marble and concealed his theft from Peinado. Actually, Rogers testified he took the marble under a claim of right, not that he converted it, and he did so with the knowledge of Peinado's employees. In any event, Rogers's testimony at the malicious prosecution trial occurred long *after* appellants filed the underlying action, and could not warrant a finding of probable cause.

C. AFFIRMATIVE DEFENSE OF GUILT IN FACT

As an affirmative defense to a cause of action for malicious prosecution, a defendant may show that the plaintiff was in fact guilty of the offense charged in the underlying action. (*Clary v. Hale* (1959) 175 Cal.App.2d 880, 889.) Appellants argue that Rogers was guilty in fact of wrongfully removing marble and concealing his taking of the marble from Peinado.

Appellants did not specifically plead guilt in fact as an affirmative defense. Nor did they assert it as an affirmative defense in their summary judgment motion, but merely incorporated it in their arguments on probable cause. The trial court did not rule on the issue in denying appellants' summary judgment motion.[12] Nor was the jury asked to make a finding on whether Rogers was guilty of converting the marble. Appellants waived the issue.

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[12] The proposed order denying summary judgment, prepared *by appellants*, stated: "With respect to the issue of guilty in fact, there is a triable issue of material fact as to whether Matt [*sic*] Rogers was guilty in fact of the allegations of theft and fraud set forth in the underlying action." The trial court struck this passage and signed the order. Rogers argues that the court's decision to do so indicates that the court did not rule on the issue because it was not properly raised due to appellants' inadequate briefing, the evidence on which it was based was inadmissible, or the purported defense was meritless.

In any event, the evidence did not compel the conclusion of Rogers's guilt of conversion. Although he testified that he took marble from the Clay Street Project, he did so with knowledge of Peinado's employees and under a claim of right because he was not being paid. There was, therefore, sufficient evidence for the court to deny summary judgment and for the jury to reject the defense. Appellants have not established that the judgment against them should be reversed on this ground.

D. QUASH OF TRIAL SUBPOENA ISSUED TO JUDGE QUIDACHAY

Appellants complain that their trial subpoena to Judge Quidachay was quashed. They contend they wanted him to testify whether he applied the rule of *D'Amico* in the underlying action to exclude the evidence set forth in the verified second amended complaint.

Rogers responds that appellants cannot pursue this issue because they failed to designate the pertinent papers in their notice of designation of clerk's transcript and election to proceed under California Rules of Court, rule 5.1. As we mentioned previously, however, Rogers included the motion to quash, supporting papers, and order quashing the subpoena in his respondent's appendix. We therefore proceed to determine the issue.

Evidence Code section 703.5 provides in part: "No person presiding at any judicial or quasi-judicial proceeding . . . shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceedings." While there were appropriate means of obtaining clarification of Judge Quidachay's order in the underlying action—which appellants did not pursue—their attempt to have him testify in the malicious prosecution was precluded by Evidence Code section 703.5. The subpoena was properly quashed.

E. MOTIONS IN LIMINE

Appellants complain of the trial court's rulings on three motions in limine. We review evidentiary rulings for abuse of discretion. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900; *People ex rel. Lockyer v. Sun Pacific Farming Co*. (2000) 77 Cal.App.4th 619, 639-640.)

1. Motion to Exclude Evidence of Damages After Summary Judgment

The trial court denied appellants' motion to preclude evidence of the legal expenses Rogers incurred in the underlying action after he obtained summary judgment. They noted that Rogers's fees were only approximately $27,000 by the time of summary judgment, but after the proceedings in which Rogers obtained an order substituting Peinado as a plaintiff on an alter ego theory, his fees had increased to $103,558.17. The fees further increased to nearly $200,000 by the resolution of the appeal. Appellants argue they can be liable only for the expenses incurred during the portion of the underlying action in which Seven Hills was making an affirmative claim for relief, as opposed to defending against Rogers's alter ego and cost motions or pursuing their appeal.

We disagree. Rogers incurred legal fees after summary judgment as part of his ongoing activity as a defendant in the litigation Seven Hills had brought through appellants. His attempt to recover his costs and attorney fees under Civil Code section 1717 and Code of Civil Procedure section 1033.5 merely sought compensation for expenses incurred as a result of the complaint appellants filed in the underlying action. (See *Gray v. Kay* (1975) 47 Cal.App.3d 562, 565-566 [request for costs or attorney fees is not a request for affirmative relief].) The expense of that pursuit was proximately caused by appellants' malicious prosecution. Similarly, Rogers's successful motion to substitute Peinado as judgment debtor was merely an attempt to ensure recovery of the amounts awarded as costs and fees, and was thus also an extension of the underlying action filed by appellants. An alter ego proceeding is not in itself a claim for substantive relief. (*Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1359; see *NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778 [describing the "equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant"].)

Appellants' reliance on *Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, to contend that Rogers could not recover his expenses incurred during appellants' appeal, is misplaced. In *Coleman*, the plaintiffs had obtained a wrongful death judgment of

$350,000 against a city. The city appealed, and the city's insurance carrier offered to settle for less than half the judgment. Plaintiffs rejected the offer. The insurer later tendered $300,000 as settlement, which plaintiffs accepted, and the appeal was dismissed. Plaintiffs subsequently filed an action for malicious prosecution against the insurer, alleging the insurer had caused the appeal to be filed in order to force plaintiffs into settling for less than the judgment amount. The *Coleman* court concluded that the *defendant's* appeal could not support a malicious prosecution claim because, unlike a cross-complaint, the appeal was not a separate action seeking affirmative relief but merely a continuation of the defendant's attempt to defend against the plaintiff's attack. (*Id*. at p. 794.)

Here, appellants' appeal of the underlying action was not an attempt on their part to defend against an attack by Rogers, but an effort to resurrect the bogus claims they had maliciously brought against him. In any event, Rogers did not base his malicious prosecution action on the fact that appellants *appealed* a judgment. Rather, the basis of the action was that appellants had maliciously asserted *causes of action* against him, and the legal fees he incurred during the appeal were merely part of the damages he sustained from appellants' meritless claims.

The trial court did not err in permitting evidence of these damages.

2. Evidence of Lyons Arbitration

Appellants moved to preclude evidence pertaining to certain aspects of the Lyons Arbitration, including Captain Moloney's testimony that Peinado's excuse for missing the arbitration hearing was a fabrication, on the ground that arbitration claims cannot give rise to a subsequent malicious prosecution action. (See *Brennan v. Tremco* (2001) 25 Cal.4th 310 [claims resolved by contractual arbitration are not subject to subsequent malicious prosecution action].)

The evidence from the Lyons Arbitration was not introduced as the basis of the malicious prosecution claim, but for the purpose of establishing that appellants knew Peinado had lied and therefore knew better than to rely on him in filing the underlying

action. The evidence, therefore, was relevant to whether appellants had acted with malice. The denial of the motion in limine was not an abuse of discretion.

3. Grant of Rogers's Motion to Exclude Evidence of Settlement Negotiation

Rogers moved in limine to exclude from evidence two letters from Peinado's partner, Joseph Breall, to Rogers's counsel. In these letters, Breall insisted that the marble theft was not subject to the termination agreement, and referenced negotiations for Rogers's additional payment of $850 to resolve the marble issue. The trial court took the matter under submission.

At trial, appellants asserted that these letters, which had been attached to the second amended complaint, contributed to their good faith belief in the merits of the underlying action. When appellants sought admission of the second amended complaint with the letters attached, the court sustained Rogers's objection. Rogers contends the letters constituted settlement communications (Evid. Code, § 1152), were hearsay (Evid. Code, § 1200), and were unduly prejudicial (Evid. Code, § 352).

Evidence Code section 1152 precludes admission of settlement discussions "to prove his or her liability for the loss or damage or any part of it." However, appellants were not offering the letters to prove the value of the stolen marble or Rogers's liability for it, but to show that they thought the parties were still negotiating settlement of the marble issue after execution of the termination agreement. This, in turn, could suggest that their client had been unaware of the purported marble theft when he signed the termination agreement, or the matter was at least not subject to the release contained in the termination agreement. Evidence Code section 1152 did not preclude admission of the letters. (See Evid. Code, § 1152, subd. (c)(2).)

As to the hearsay objection, the letters were obviously out of court statements. However, they were not offered for their truth (i.e., that there *were* settlement discussions), but for the nonhearsay purpose of the effect they had on appellants when they read them (i.e., their *belief* that there were settlement discussions regarding the

marble after the termination agreement). The letters were therefore not inadmissible hearsay.[13]

As to Evidence Code section 352, it is plausible that the trial court concluded the probative value of the letters was substantially outweighed by the risk that the letters would confuse or mislead the jury. Rogers had argued, in his motion in limine, that admission of the documents would necessitate the admission of additional evidence concerning the purported settlement negotiations. Although we would not have reached the same conclusion, we cannot say that the court was entirely irrational and arbitrary to do so. At any rate, appellants did not address the Evidence Code section 352 issue in their briefs on appeal. In the final analysis, they have failed to affirmatively establish error.

F. EXCLUSION OF PEINADO DECLARATION

At trial, Rogers proffered evidence of portions of the Peinado Declaration, in which Peinado had represented that he suspected the marble conversion by the time he fired Rogers. Appellants sought admission of the entire Peinado Declaration, to show that there were so many factual assertions in the declaration that it was reasonable for appellants to have made a mistake in stating one of those facts. The trial court refused.

Rogers defends the trial court's ruling, by asserting that the Peinado Declaration was inadmissible hearsay. He is incorrect, because the declaration was not offered to prove the truth of the matters asserted in it, but for the nonhearsay purpose of explaining appellants' purportedly confused state of mind when drafting the document due to the number and complexity of factual assertions the declaration covered. This purpose was material to the litigation, because it attempted to explain why appellants would accept Peinado's subsequent assertion that, contrary to what they had written in the Peinado

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13 Rogers's argument that appellants did not establish any exception to the hearsay rule misses the point. If a statement is not offered for its truth, it is not inadmissible hearsay, and there is no need to consider whether it falls within a hearsay exception.

Declaration, he had not known about the missing marble at the time of the termination agreement.[14]

The relative probative value of this evidence, however, was weak. The idea that attorneys Franck and Gargaro made a mistake in drafting the Peinado Declaration does little to justify proceeding with the underlying action, since Peinado had adopted their "mistake" under penalty of perjury in signing the declaration. When they filed the complaint, therefore, they knew their client had sworn to a statement which rendered the underlying action meritless. In light of the slight probative value of the evidence, the trial court could have reasonably concluded that the introduction of the declaration in its entirety, which dealt with the details of the Lyons Arbitration, would unduly confuse and mislead the jury and was thus inadmissible under Evidence Code section 352.

Furthermore, any error in denying admission of the Peinado Declaration was harmless. Franck was able to testify orally about the length and complexity of the declaration, and there is no reasonable probability that admission of Peinado's Declaration would have resulted in an outcome more favorable to appellants.

G. APPELLANTS' PROPOSED JURY INSTRUCTIONS

Appellants complain that the trial court rejected three of their proposed jury instructions. They fail to establish reversible error.

First, appellants note that they proferred a jury instruction on their guilty-in-fact defense. However, they had not raised this defense in their pleadings or proposed to amend their answer according to proof. They cannot obtain reversal of a judgment by arguing the court did not instruct the jury on a defense they never alleged.

Second, appellants requested jury instructions to the effect that they could not be liable for damages incurred during the post-summary judgment and appeal phases of the

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14 Franck's additional argument—that he wanted to show the jury that he had a preparatory document in filing the complaint in the underlying action—is absurd. The Peinado Declaration asserted that Peinado suspected Rogers had converted the marble by the time of Rogers's termination, in complete contradiction of the allegations of the complaint in the underlying action.

underlying action, because they could not be held liable for mounting a malicious "defense." (See *Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 52 [defense does not give rise to malicious prosecution action, although cross-complaint can give rise to a malicious prosecution action because it seeks affirmative relief and creates an action distinct and separate from the initial pleading].) As explained *ante* in connection with appellants' in limine motions, however, their conduct after the summary judgment in the underlying action was not purely defensive, but an extension of the litigation they had maliciously initiated and maintained.

Third, the trial court instructed the jury with respect to malice, in accordance with BAJI No. 7.34. Appellants proposed an instruction that would have required the jury to find "evil or sinister purpose" or "intent to injure" in order to find malice for purposes of the malicious prosecution claim. Appellants have not established that the instruction given by the court was erroneous.

H. REFERENCES TO APPELLANTS' PURPORTED INTENT TO FILE BANKRUPTCY

During the punitive damages phase of the trial, Rogers's counsel (Katzoff) asked appellant Franck, "do you recall telling me that Mr. Rogers will never see a nickel of any award the jury gave because you were going to file for bankruptcy?" Franck objected on the ground the question was irrelevant and improperly elicited evidence of settlement discussions. The court overruled the objection. Franck then denied making the statement.[15]

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15 The colloquy went as follows: "Q. You don't have any intention for filing for bankruptcy, do you? [¶] THE WITNESS: Your honor, I don't think that's relevant. [¶] THE COURT: You may answer. [¶] THE WITNESS: Well -- [¶] MR. KATZOFF: Q. Mr. Franck, do you recall telling me that Mr. Rogers will never see a nickel of any award the jury gave because you were going to file for bankruptcy? [¶] THE WITNESS: Your honor, counsel is referencing settlement discussions, and I object. And also, Your Honor, it is not pertinent to the wealth issue. [¶] MR. KATZOFF: Q. Well, it is. Are you planning to file for bankruptcy? [¶] THE COURT: Please answer. [¶] THE WITNESS: What question am I answering? I am sorry. [¶] MR. KATZOFF: Q. Do you recall telling me that any general damages awarded [*sic*], my client would never see a penny because you are going to file for bankruptcy and wipe them out. [¶] A. I recall

Appellants contend that the trial court erred. We agree that Franck's intent in regard to paying the malicious prosecution judgment was not relevant to his intent in prosecuting the underlying action, and thus not relevant to the reprehensibility of his actions. Nor was it particularly probative of the amount the jury should impose as punitive damages in order to punish and deter. The question was quite inflammatory. Indeed, Katzoff asked the question immediately after inquiring whether Franck filed tax returns separate from his wife in order to evade creditors.

Even if the court erred in permitting this question, however, appellants have not established that the jury would have assessed a smaller punitive damage award without it. In the first place, Franck *denied* making the statement. And, although his denial might not negate the innuendo of the question, the proposition that Franck contemplated filing for bankruptcy protection was actually consistent with his position that he had a negative net worth and, accordingly, should not be saddled with a significant punitive damage award. In any event, we need not determine whether Katzoff's question requires reversal of the punitive damage award, since we will vacate the award on another ground.

Appellants also complain that, during closing argument in the punitive damages phase, Katzoff told the jury: "As you heard from the testimony, they may never--Mr. Franck has indicated he may never pay a nickel of those. However, by your punitive damages, they will last forever, they can't be discharged." Franck objected: "Your honor, I am sorry I just would like to assert an objection. I have a constitutional right with bankruptcy and you are not allowed to get into it here." The court responded, "You have a constitutional right to it."

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you and I having settlement discussions and where that came up, but other things came up. Can I talk about the other things also? [¶] . . . [¶] Q. I am simply asking you if you made that threat, that if there were any punitive damages, that they would be discharged in bankruptcy proceedings, we're doing this for nothing for we will never see a nickel? [¶] A. That's not the way I said it. During our settlement discussions where you made--[¶] . . . [¶] THE WITNESS: I don't think I said it that way, no. I know we discussed it, but I didn't say it that way."

Appellants argue that Katzoff's statement in closing argument was contrary to the law, because neither compensatory nor punitive damages in a malicious prosecution judgment are dischargeable in bankruptcy. (See *In re Abbo* (6th Cir. 1999) 168 F.3d 930, 931.) Appellants did not object, however, on the ground that Katzoff was misstating the law or even that the statement was unduly inflammatory. Nor did appellants request that the trial court admonish the jury or Katzoff in any way. Appellants merely objected on the ground they have a constitutional right to seek bankruptcy protection (thus cementing in the jury's mind their intention of doing so), and the court affirmed their statement. Appellants do not establish error.

I. APPELLANTS' OTHER ARGUMENTS FOR REVERSAL OF THE JUDGMENT

Appellants contend the compensatory and punitive damage awards were excessive and Gargaro cannot be held liable as a law firm employee. These issues were not included in appellants' statement of issues, and on that basis we do not address them as independent grounds for reversal of the judgment.

However, appellants did include in their statement of issues a challenge to the denial of their motion for a new trial, and their amended notice of appeal purported to appeal from the judgment and all postjudgment orders. Their new trial motion had asserted numerous grounds, including the issues of excessive damages and, to some extent, Gargaro's liability as an employee. We next turn to those issues in the context of the denial of the new trial motion. (The other grounds appellants had asserted for a new trial have already been addressed in this opinion; as we found no basis for reversal of the judgment on any of these grounds, they do not compel reversal of the order denying a new trial and we need not address them further.)

J. DENIAL OF APPELLANTS' MOTION FOR NEW TRIAL

We review the denial of a new trial motion for abuse of discretion. (*Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1800.)

1. Compensatory Damages

Appellants contend the $500,000 compensatory damage award was excessive, because it was not a reasonably foreseeable amount of damages from the filing of a

lawsuit that alleged the theft of merely $3,000 worth of marble. Further, they contend, their conduct was not a direct cause of the damages, because there were "intervening acts" of the alter ego motion instituted by Rogers and the appeal.

The trial court did not abuse its discretion in concluding there was substantial evidence to support the compensatory damage award. The gauge for assessing the reasonableness of the award was not how much appellants' client had sought in the underlying action, but how much Rogers was harmed. As evidence of the costs he incurred in the underlying action, Rogers submitted his attorney's invoices reflecting about $200,000 in legal defense expenses. The court in the underlying action had found the legal expenses to be reasonable. Appellants characterize the figure as "stratostrophic," but do not direct us to any *evidence* establishing that the expenses were unreasonable.

Because the jury awarded $500,000 in compensatory damages, the amount in excess of the $200,000 litigation expense must have been imposed for emotional distress and injury to reputation. In this regard, Rogers testified generally to the anxiety of potentially being held liable in the underlying action and the cost of his defense, as well as the effect the litigation had on his business: ". . . I felt pretty drained and pretty wasted. The sort of the ongoing threat of being assailed with bills that are too difficult to deal with, but on the other hand being bullied into a place that I would regret the rest of my life, it's been a difficult thing. It's a miserable thing. And I finally decided that I wanted to do something that would -- maybe I would make less money, but when I get the job done, it's done, I get paid, I move on. And so I just quit contracting." Further, Rogers testified, he had become jaded and, even though he "love[d] doing larger scale projects and designing larger scale projects," he "just [had] such a bad taste in [his] mouth that [he] just [didn't] want to do it anymore." When asked how much time he spent in *arbitration*, he responded: "I spent a lot of time. And that's the worst part about the whole thing is the time in thinking about things that are upsetting, and it's been enormous, enormous, because, you know, you obsess on the outrageous claims and the sense of outrage in it, and it's an enormously draining negative thing to deal with."

This evidence is by no means overwhelming proof of substantial emotional distress, and there was no evidence that Rogers consulted with doctors or other health care providers about his stress. In reviewing the compensatory damage award as part of our review of the denial of the new trial motion, however, we must be mindful that our review is limited to determining if the trial court abused its discretion in deciding that sufficient evidence supported the jury's damage calculation. It cannot be said that the trial court acted irrationally or arbitrarily in this determination. Appellants have therefore failed to establish error in the denial of their new trial motion on the ground of excessive compensatory damages.

2. Excessive Punitive Damages

Under California law, we reverse a punitive damage award when it appears excessive as a matter of law or is so grossly disproportionate that it raises the presumption of passion or prejudice. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 (*Neal*).) Because the award should not exceed the amount necessary to accomplish its purpose of punishment and deterrence, it must be tailored to the defendant's financial status. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1593 (*Michelson*).) Under California authority, therefore, we consider (1) the reprehensibility of the defendant's conduct; (2) the actual harm suffered by his victims; and (3) the defendant's wealth. (*Neal, supra,* at p. 928.) Similarly, in examining whether the award is consistent with federal due process, we evaluate (1) the degree of the defendant's culpability, (2) the ratio between the punitive award and the harm to the victim caused by the defendant's actions, and (3) the sanctions imposed in other cases for comparable misconduct. (*State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 123 S.Ct. 1513, 1520 (*Campbell*); see *Romo v. Ford Motor Co*. (2002) 99 Cal.App.4th 1115, 1146-1152 [applying both state and federal standards].) And, although we ordinarily accord great weight to the trial court's refusal to grant a new trial on the amount of punitive damages, we are also aware that punitive damage awards are disfavored in the law, because they compensate the plaintiff beyond his actual loss. (*Stevens v. Owens-Corning Fiberglas Corp*. (1996) 49 Cal.App.4th 1645, 1658.)

In the matter before us, the reprehensibility of Franck's conduct was reflected in his dogged pursuit of claims barred by the termination agreement, in ostensible support of his client's attempt to retaliate for Rogers's win in the Lyons Arbitration. The jury concluded that Rogers was harmed as a result of Franck's conduct—including monetary loss, emotional distress, and injury to reputation—to the tune of $500,000. The ratio between the $400,000 punitive award and the $500,000 of harm to Rogers was less than 1 to 1, which is by no means an excessive ratio. (See *Campbell*, *supra*, 123 S.Ct. at p. 1524; *Diamond Woodworks, Inc. v. Argonaut Ins. Co*. (2003) 109 Cal.App.4th 1020, 1057.) Further, appellants fail to establish that the award was excessive when compared to sanctions in other cases for similar misconduct. (See generally *Campbell*, *supra*, at p. 1520.)

We are concerned, however, with the relationship between the $400,000 punitive damage award and the evidence of Franck's net worth. Rogers bore the burden of producing evidence of Franck's financial condition, so he could establish that the punitive award was not greater than necessary to accomplish punishment and deterrence. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 111-116.) In this regard, there was evidence Franck earned $50,000 to $60,000 per year (with a "high" of $80,000 in a prior year), and his wife earned approximately $40,000. Franck's law practice generated approximately $246,000 in revenue, yielding a net profit of less than $2,000. As to assets, neither Franck nor his wife owns any real estate. Franck owns the furniture and computers in his law office and an Izusu Trooper, while his wife owns a Mercedes worth around $25,000. Franck has about $1,500 in a bank account and account receivables of roughly $26,000. He also owns copyrights to six published novels and seven screenplays, none of which has generated any revenue. Although the intellectual property rights in those works *might* have value, Rogers offered no evidence to rebut Franck's assessment that they were worthless in light of his prolonged inability to sell his novels and screenplays. As to his debts, Franck testified he owed the Internal Revenue Service about $75,000 and an individual $65,000. Based on this evidence, Franck argues he has a *negative* net worth. And while net worth may not be the only gauge of a defendant's financial condition, the

nature of Franck's conduct and the totality of the circumstances do not justify a punitive damage award so greatly in excess of Franck's net worth.

Helpful to our analysis is *Michelson, supra,* 29 Cal.App.4th 1566. In *Michelson*, the court reversed a punitive damage award of $1,250,000, which represented 28 percent of the defendant's net worth. (*Id*. at p. 1596.) In so doing, the court explained: "A court of review must intervene when the award is so disproportionate as to raise the presumption that it was the product of passion or prejudice, even though deference is due a trial court's approval of a punitive damage award. [Citation.] Punitive damages constitute a windfall. [Citation.] Such awards generally are not allowed to exceed 10 percent of the net worth of the defendant. [Citation.] We find the award to be excessive as a matter of law." (*Michelson*, *supra*, at p. 1596; see also *Zhada v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 500 [punitive damages award exceeding one third of defendant's net worth could only be justified if it was necessary to put defendant out of business in order to deter future conduct, supported by clear evidence of a continuing course of conduct of large-scale flagrant violations].)

We conclude the punitive damage award of $400,000 was so disproportionate to Franck's wealth that, in the totality of circumstances, we must presume it arose from the passion or prejudice of the jury. The award is excessive as a matter of law and must be vacated.

3. Finding of Liability Against Gargaro as Law Firm Employee

Lastly, appellants contend that Gargaro could not be held liable for malicious prosecution because he was merely a law firm employee and acted only as Franck's agent. Generally, he argues, the employer is responsible for the torts committed by the employee during the scope of his employment. (Civ. Code, § 2343.) Although appellants barely addressed the issue in their new trial motion, asserting essentially that there was no evidence Gargaro knew the content of the Peinado Declaration, the record is sufficient for us to conclude their contention is meritless.

Gargaro was an attorney. An attorney who signs a complaint certifies by his signature that the complaint is not being submitted for an improper purpose, the claims

are warranted by existing law or by nonfrivolous argument for modification or reversal of existing law, and the factual contentions have evidentiary support. (Code Civ. Proc., § 128.7, subd. (b).) In the matter before us, Gargaro signed the complaint, albeit in Franck's name, in the underlying action. After Rogers's counsel informed him of the falsity of the allegations and reminded him of his duties under Code of Civil Procedure section 128.7, Gargaro proceeded to sign the amended verified complaint on Franck's behalf. By this time Gargaro was certainly aware of the Peinado Declaration and its purported falsity. Yet there was no evidence Gargaro performed any research or investigated Peinado's contradictory claim. After Franck closed his law practice and left California, Gargaro and his own law office continued to prosecute the underlying action through appeal, as attorney of record. At the very least, by that point Gargaro was acting as a principal and counsel of record in prosecuting the underlying action. (See *Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263.) It was not error to hold him liable for malicious prosecution.

III. DISPOSITION

We vacate the punitive damage award against Franck, and the matter is remanded for the trial court to reconsider Franck's motion for remittitur as to punitive damages, or in the alternative for a new trial on the issue of punitive damages. The judgment is otherwise affirmed. Each party to bear its own costs on appeal.

STEVENS, J.

We concur.

JONES, P.J.

SIMONS, J.